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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 365

LUX ART VAN SERVICE, INC., a California Corporation,
Petitioner,

vs.

ART POLLARD,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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No. .....

LUX ART VAN SERVICE, INC., a California Corporation,
Petitioner,

vs.

ART POLLARD,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

A writ of certiorari is respectfully sought by petitioner, Lux Art Van Service, Inc., a corporation, to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on April 20, 1965.

OPINIONS BELOW

There was no formal opinion of the United States District Court for the District of Arizona. The opinion of the Court of Appeals for the Ninth Circuit (Appendix B, *infra*) is reported at 344 F.2d 883.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was made and entered on April 20, 1965, and a copy thereof is appended to this petition in Appendix B, *infra*. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTION PRESENTED

The question presented by this petition is as follows:

Is a bailee-for-hire, in the absence of actual authority, vested with ostensible authority to undertake shipment of property in interstate commerce from the place of bailment to the property owner, and to bind the property owner by the terms of the shipping contract, including a released value clause authorized by the Carmack Amendment [49 U.S.C. § 20 (11)] to the Interstate Commerce Act?

STATUTES INVOLVED

The statutory provisions involved are Sections 1 (4), 20 (11), and 319 of the Interstate Commerce Act, 49 U.S.C. §§ 1 (4), 20 (11), and 319. They are printed in Appendix A, *infra*.

STATEMENT OF THE CASE

Petitioner at all material times was an interstate carrier of livestock other than ordinary, including race horses, show horses and breeding stock, with a tariff duly posted, published and filed with the Interstate Commerce Commission. Petitioner's tariff provided for rates based on declared value of the livestock transported.

In January, 1962, a certain mare owned by respondent was transported by respondent's ranch foreman from respondent's ranch in southeastern Arizona to the Vessels Ranch, Los Alamitos, California, for breeding purposes.

Respondent was billed monthly for the board of the mare, which was under exclusive control of the Vessels Ranch while at the California ranch. Vessels Ranch is a corporation. On or about June 20, 1962, petitioner's office manager received a telephone call from the general manager in charge of the breeding program at Vessels Ranch, reporting that respondent had a mare he wanted transported from the Vessels Ranch to Arizona, and ordering such transportation. On July 14, 1962, respondent's horse was delivered to petitioner for interstate shipment by an employee of the Vessels Ranch, who executed a bill of lading for the "Shipper (Owner or duly authorized agent of Owner)" in the apparent course and scope of his authority as an employee of the Vessels Ranch. Terms of the bill of lading limited petitioner's liability to the declared value of the animal described therein. The bill of lading declared the value of respondent's horse at $150.00, reciting a basic shipping charge and no charge for excess value.

Respondent's horse expired in transit on July 14, 1962. Respondent, a citizen of Arizona, commenced a civil action for a sum in excess of $10,000.00, exclusive of interest and costs, against petitioner, a citizen of the State of California, in the United States District Court for the District of Arizona. Jurisdiction was based on 28 U.S.C. § 1332. Respondent based his claim on allegations of negligence and conversion; petitioner denied these allegations and, alternatively, alleged that under the terms of the bill of lading the value of respondent's mare was declared at the sum of $150.00 and respondent's damages, if any, were limited to that amount. The case was tried to the court, sitting without a jury. Respondent testified that his arrangements with the Vessels Ranch regarding the return of his mare were that someone was to call respondent when the mare was in

foal and respondent was to come to get her. Petitioner had no knowledge of any arrangements between respondent and Vessels Ranch. The District Court found as a fact that petitioner was negligent; that the bill of lading was not signed by or with authority of respondent; that the fair cash market value of the mare was $25,000.00; and concluded that the doctrine of res ipsa loquitur was applicable to respondent's claim; that petitioner had failed to establish that it was free from negligence; that the bill of lading was without force or effect in any way limiting respondent's rights or the amount of his recovery against petitioner; and that petitioner was liable to respondent in the sum of $25,000.00, plus costs. Judgment in accordance with the said findings and conclusions was entered on March 6, 1964.

Petitioner filed timely notice of appeal to the United States Court of Appeals for the Ninth Circuit, invoking 28 U.S.C. § 1291 as the jurisdictional basis for the appeal. The Court of Appeals affirmed the judgment of the District Court in a judgment entered April 20, 1965. This petition followed.

REASONS FOR GRANTING THE WRIT

The judgment of the Court of Appeals should be reviewed because it is in conflict with the decision of this court in *Great Northern Railway Co. v. O'Connor*, 232 U.S. 508, 34 S. Ct. 380, 58 L.Ed. 703, and imposes an unjust burden on a common carrier, which is required by Section 1 (4) of the Interstate Commerce Act to provide and furnish transportation upon reasonable request therefor.

Petitioner was not merely entitled to rely on the ostensible authority of Vessels Ranch to ship respondent's horse to its owner; petitioner was required by law to receive the

horse for shipment under terms in accordance with its tariff, including a reasonable limitation of liability to declared value as authorized by the Carmack Amendment [49 U.S.C. § 20 (11)] to the Interstate Commerce Act.

Under the rule of *Great Northern Railway Co. v. O'Connor*, which opinion is set forth in Appendix C, *infra*, petitioner is not bound by private instructions or limitation on the authority of the bailee chosen by respondent; if there was any undervaluation, wrongful classification, or violation of respondent's instructions, resulting in damage, respondent's remedy lies against the bailee which it selected. Under the judgment of the Court of Appeals, however, the Vessels Ranch is insulated from liability for violation of respondent's instructions by the holding that petitioner had no legal right to rely on the bailee's misrepresentation of its authority to undertake the shipment; thus petitioner cannot recover from the bailee for such misrepresentation.

In reaching its decision, the Court of Appeals has chosen to ignore the fact that it was respondent who selected the Vessels Ranch, and entrusted his horse to a bailee which violated his instructions, whereas petitioner had no knowledge of such instructions or the bailee's violation thereof. Instead, the court would justify its opinion by emphasizing that "the carrier's negligence[1] caused the loss." In other words, the question of limited liability is to be disposed of by the identical grounds imposing any liability at all, without which the question never would have arisen in the first place. In the exercise of sound judicial discretion, such reasoning should not go unreviewed.

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1. It is to be noted that the Court of Appeals relies on the doctrine of res ipsa loquitur, in the absence of any substantial evidence of negligence, to support the District Court's judgment.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

SIDNEY WEISSBERGER
Counsel for Petitioner

JAMES L. RICHMOND
Of Counsel

(Appendices Follow)

Appendix A

INTERSTATE COMMERCE ACT

Title 49, United States Code

49 U. S. C. § 1 (4)

It shall be the duty of every common carrier subject to this chapter to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this chapter to establish reasonable through routes with common carriers by water subject to chapter 12 of this title, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers.

49 U. S. C. § 20 (11)

Any common carrier, railroad, or transportation company subject to the provisions of this chapter receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common

carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever shall exempt such common carrier, railroad, or transportation company from the liability imposed; and any such common carrier, railroad, or transportation company so receiving property for transportation from a point in one State, Territory, or the District of Columbia to a point in another State or Territory, or from a point in a State or Territory to a point in the District of Columbia, or from any point in the United States to a point in an adjacent foreign country, or for transportation wholly within a Territory, or any common carrier, railroad, or transportation company delivering said property so received and transported shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is declared to be unlawful and void: *Provided,* That if the loss, damage, or injury occurs while the property is in the custody of a carrier by

water the liability of such carrier shall be determined by the bill of lading of the carrier by water and by and under the laws and regulations applicable to transportation by water, and the liability of the initial or delivering carrier shall be the same as that of such carrier by water: *Provided, however,* That the provisions hereof respecting liability for full actual loss, damage, or injury, notwithstanding any limitation of liability or recovery or representation or agreement or release as to value, and declaring any such limitation to be unlawful and void, shall not apply, first, to baggage carried on passenger trains or boats, or trains or boats carrying passengers; second, to property, except ordinary livestock, received for transportation concerning which the carrier shall have been or shall be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released, and shall not, so far as relates to values, be held to be a violation of section 10 of this title; and any tariff schedule which may be filed with the commission pursuant to such order shall contain specific reference thereto and may establish rates varying with the value so declared and agreed upon; and the commission is empowered to make such order in cases where rates dependent upon and varying with declared or agreed values would, in its opinion, be just and reasonable under the circumstances and conditions surrounding the transportation. The term "ordinary livestock" shall include all cattle, swine, sheep, goats, horses, and mules, except such as are chiefly valuable for breeding, racing, show purposes, or other special uses: *Provided further,* That nothing in this section shall deprive

any holder of such receipt or bill of lading of any remedy or right of action which he has under the existing law: *Provided further*, That all actions brought under and by virtue of this paragraph against the delivering carrier shall be brought, and may be maintained, if in a district court of the United States, only in a district, and if in a State court, only in a State through or into which the defendant carrier operates a line of railroad: *Provided further*, That it shall be unlawful for any such receiving or delivering common carrier to provide by rule, contract, regulation, or otherwise a shorter period for the filing of claims than nine months, and for the institution of suits than two years, such period for institution of suits to be computed from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice: *And provided further*, That for the purposes of this paragraph and of paragraph (12) of this section the delivering carrier shall be construed to be the carrier performing the line-haul service nearest to the point of destination and not a carrier performing merely a switching service at the point of destination: *And provided further*, That the liability imposed by this paragraph shall also apply in the case of property reconsigned or diverted in accordance with the applicable tariffs filed as in this chapter provided.

49 U. S. C. § 319

The provisions of section 20(11) and (12) of this title, together with such other provisions of chapter 1 of this title (including penalties) as may be necessary for the enforcement of such provisions, shall apply with respect to common carriers by motor vehicle with like force and effect as in the case of those persons to which such provisions are specifically applicable.

Appendix B

United States Court of Appeals for the Ninth Circuit

No. 19,397

LUX ART VAN SERVICE, INC., a California Corporation, *Appellant*,

vs.

ART POLLARD, *Appellee*.

[April 20, 1965]

Appeal from the United States District Court for the District of Arizona

Before: Jertberg, Koelsch and Browning, Circuit Judges

Koelsch, Circuit Judge.

This is a diversity case, commenced and prosecuted in the United States District Court by Art Pollard against Lux Art Van Service, Inc., (Lux) to recover damages for the death of his horse "Chinchilla" which occurred during shipment by Lux. Trial to the court, sitting without a jury, resulted in judgment for Pollard in the amount of $25,000. Lux has appealed.

Pollard raises quarter horses for racing.[1] His ranch is located in southeastern Arizona, near Tucson. Lux is a common carrier, duly certified by the Interstate Commerce Commission to transport by motor truck in interstate commerce livestock other than ordinary.[2]

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1. The name derives from their ability to run a quarter of a mile at phenomenally high speed. Such horses are compact and heavily muscled thoroughbreds.

2. Ernest Baum, president of Van Service, explained that "livestock other than ordinary" meant "race horses, showhorses, breeding stock. In other words, registered animals other than ordinary killer stock or butcher, used for butcher purposes."

Chinchilla was an outstanding brood mare.[3] In January, 1962 Pollard took her from his ranch to the stud farm operated by Vessels Ranch, Inc. near Los Alamitos, a small town in southern California. He had taken other mares there to be bred and it was his regular practice to transport them both ways, using his own equipment and personnel. During their stay, which varied from three to six months, the mares were in the care and under the exclusive control of Vessels. When they were well in foal, Vessels so advised Pollard who then fetched them himself.

However, in this instance, Vessels did not notify Pollard, but instead made arrangements with Lux to return Chinchilla. Shortly before noon on July 14, 1962, a Lux truck, operated by John Depew and an assistant, both Lux employees, came to the Vessels farm. Attached to the truck was a large van type trailer, entirely enclosed except for ventilating slits on either end and at intervals along the sides. Inside, the trailer was partitioned into three rows of box stalls, three in each row. Chinchilla was put in the center stall in the first row. The truck and trailer then proceeded on to two neighboring farms, where additional horses were loaded. By 10:30 that evening the truck had reached a point beyond San Diego and was traveling eastward in the vicinity of El Centro when the driver heard an unusual commotion in the trailer. Upon investigating, he discovered that, although the other five hores appeared to be normal, Chinchilla had collapsed in her stall. She was immediately removed from the trailer and a local veterinarian, John C. Pace, was summoned. He arrived soon afterward, but by 11:00 o'clock Chinchilla was dead.

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3. She was 11 years of age at the time of her death—just well into her productive span; all five of the colts she had foaled were rated by the American Quarter Horse Association as Triple A plus—the highest echelon possible for racing quarter horses. Her value was variously estimated at from $60,000-$100,000.

Pollard couched his complaint in two alternative counts; in one he based the claim on negligence and, in the other, on conversion.[4] The district judge predicated recovery on negligence.[5] He found that Chinchilla was "in apparent good, sound condition when accepted by the defendant for shipment . . .; [t]hat at all times subsequent to the delivery of said mare to the defendant, defendant was in sole, exclusive and absolute custody . . . and possession of [her] . . .; that the trailer in which the mare "Chinchilla" was transported by the defendant was improperly and inadequately ventilated for shipping a live animal in the middle stall of the forward compartment of said trailer during the prevailing hot weather in the near desert area of southwest California . . ." that the defendant "failed to periodically water the mare . . . so as to counteract the debilitating effects of overheating of the mare . . ." and that as a result she died of heat exhaustion.

Lux contends that there was no substantial evidence to show either that its trailer was in any way unsuitable to transport horses like Chinchilla, or that its employees neglected or improperly cared for her during the trip. It makes a very persuasive argument. The evidence adduced by Pollard on the issue consisted of the testimony of three witnesses, each of whom was allowed to state generally that, in his opinion, a van type trailer of the kind used by Lux did not provide adequate ventilation to safely maintain horses confined inside during hot weather. Lux points out this testimony was all objected to; that the witnesses can-

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4. Although there is some divergence among the authorities, the rule most generally announced is that mere negligence will not support a claim for conversion. See 53 Am. Jur. Trover and Conversion, in section 52.

5. The allegations set out a general charge as well as specific acts of negligence.

didly conceded that they had never used or been concerned with such trailers; that they had no knowledge of their construction, and knew nothing of the manner in which air was circulated in them. Thus, it is doubtful whether their testimony should have been received. In addition, the evidence was that Lux had periodically offered the horses water enroute.

However, in this instance, we need not decide whether Pollard had adduced sufficient evidence of specific acts of negligence. The formal findings do enumerate several such acts, in addition to the general finding of negligence, but the judge made it clear that he also relied upon the rule of evidence commonly referred to as the Doctrine of *Res Ipsa Loquitur*, to reach the ultimate factual conclusion.[6] And circumstantial evidence satisfying the requirements of the doctrine affords ample support for a finding of negligence. Nor is the questioned proof of specific acts of negligence in this case fatal to the doctrine's application.[7]

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6. He said as much. One of the formal Conclusions of Law consists of the recital. "That the Doctrine of Res Ipsa Loquitur is applicable to plaintiff's claim: This doctrine raises the rebuttable presumption that from the occurrence itself, to-wit: the death of the plaintiff's mare, Chinchilla, under the circumstances herein related, the defendant was negligent and that such negligence proximately caused the death of the plaintiff's mare Chinchilla on July 14, 1962 near El Centro, California." When read in context, this statement means that Lux had failed to overcome the inference which the trial judge, as fact finder, derived from the evidence favorable to Pollard, not that the doctrine operated to shift to Lux the burden of proving its freedom from negligence. See Sweeney v. Erving, 228 U.S. 233, 241 (1913); Commercial Molasses Corp. v. N.Y. Tank Barge Corp., 314 U.S. 104 (1941).

7. The following illustration appearing in an illuminating article by Dean Prosser entitled "Res Ipsa Loquitur in California", 37 Cal. L.Rev. 183, 213-214 (1949) serves to demonstrate why, in the case before us, the doctrine survives in spite of the proof given by Pollard's "experts":

"When the plaintiff shows that he was on the defendant's train and the train was derailed, there is an inference that the defend-

The rule, or doctrine, as generally expressed is:

> ". . . when a thing which causes injury, without fault of the injured person, is shown to be under the exclusive control of the defendant, and the injury is such as in the ordinary course of things does not occur if the one having such control uses proper care, it affords reasonable evidence, in the absence of an explanation, that the injury arose from the defendant's want of care."

San Juan Light & Transit Co. v. Requena, 224 U.S. 89, 98-99 (1912). See 9 Wigmore, *Evidence* § 2509 at p. 377 (3d ed. 1940).

In this milieu, we conclude that resort to the Doctrine was not unwarranted. Dr. Pace testified that the weather was hot, "ninety-five to a hundred." He diagnosed Chinchilla's condition as heat exhaustion, and gave that as the cause of her death. The court's finding was to that effect. In addition, Dr. Pace, and several other experts, explained (and their testimony was uncontradicted) that heat exhaustion is brought on by keeping a horse in unduly confined quarters during hot weather, not supplying it with sufficient water,

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ant has been negligent, and a res ipsa case. When he goes further and shows that the derailment was caused by an open switch, he destroys any inference that it was due to excessive speed of defective track; but the inference that the defendant had not used due care in looking after its switches is not destroyed, but considerably strengthened. To say that res ipsa does not apply is to say that the weaker inference may be drawn, but the stronger may not. If the plaintiff goes still further and shows that the switchman was drunk and left the switch open, there is nothing left to infer and the plaintiff must stand or fall on his specific proof. If he shows that the switch was thrown by an escaped convict with a grudge against the railroad he has proved himself out of court. It is only in this sense that when the facts are known there is no room for inference, and res ipsa loquitur vanishes from the case. Particularly when the plaintiff introduces only some circumstantial evidence suggesting a definite cause for the accident it cannot be said that the normal inferences are defeated."

or otherwise failing to keep the animal cool. They also gave testimony, the substance of which was that with proper care, suitable facilities and adequate provision for watering, a horse could be hauled overland in a trailer without suffering any ill effects, regardless of weather conditions.

We are fully aware that the doctrine does not ordinarily apply in situations where an animal sustains some physical injury or becomes sick while in possession of a carrier. This exception is based "on the peculiar propensity of animals to injure themselves and each other," [*Missouri Pac. Ry. Co. v. Elmore & Stahl*, 377 U.S. 134, 139 (1964)] and the likelihood that the disease was incipient when the carrier received the animal for shipment. *Vaughn v. St. Louis-San Francisco Ry. Co.*, 223 Mo. App. 732, 15 S.W.2d 901, 906 (1929); *Rudy v. Chicago, Milwaukee, St. Paul & Pac. Ry. Co.*, 5 Wis. 2d 37, 92 N.W. 2d 367, 370 (1958). Here, of course, we are not concerned with a death resulting from external injury, and the evidence of sickness—if heat exhaustion may be so classified—all points to the conclusion that the condition was not present in any degree whatever when Lux loaded Chinchilla, but instead commenced sometime afterward while she was riding in the van through the hot desert. She had been examined by a veterinary immediately prior to the trip and certified as being in good health, free of contagious disease, and eligible to be shipped from California into Arizona. But entirely aside from that fact, there was evidence that the onset of heat exhaustion is very rapid after an animal has been exposed to an inducing condition; that two hours is "a long time." And Dr. Pace opined that Chinchilla had been exposed to excessive heat "about an hour or close to that" before he saw her. At the latter time, she had been in Lux's exclusive possession for upwards of 10½ hours.

The next point presents a more difficult problem. Lux alleged, by way of affirmative defense, that in any event his liability for the loss was limited to $150.00, that being the value declared by the Vessels Ranch in the Bill of Lading which one of the Vessels employees signed. The cost of transportation was based upon that figure and it appeared that Vessels had not requested that the horse be hauled at any of the higher rates available to shippers who desired greater protection.[8]

At the trial, Lux took the position that Pollard had constituted Vessels Ranch his agent to ship Chinchilla. However, the trial judge decided otherwise and held that Pollard was not bound by the limiting provision in the shipping agreement. We agree.

The several bases upon which, and the reasons why, a principal is bound by the acts of an agent are clearly and concisely set out in the following extract from *Law v. Stokes*, 90 Am. Dec. 655, 656-657 (N.J. 1867):

> "A principal is bound by the acts of his agent within the authority he has actually given him, which includes not only the precise act which he expressly authorized him to do, but also whatever usually belongs to the doing of it or is necessary to its performance. Beyond that he is liable for the acts of the agent within the

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8. Public policy renders void any agreement exempting a common carrier for liability caused by its own negligence. The Carmack Amendment [49 U.S.C. 20 (11)] to the Interstate Commerce Act permits limitation of liability where a choice of rates is offered varying with the value of the property to be shipped. Union Pacific R.R. v. Burke, 255 U.S. 317 (1921). And the limitation is binding even though, as here, it is grossly disproportionate to the actual value of the shipment. Pierce Co. v. Wells Fargo & Co., 236 U.S. 278 (1915).

Authority to ship confers upon the agent the incidental authority to enter into a valid contract with a carrier concerning liability. Frohlich Glass Co. v. Pennsylvania Co., 101 N.W. 223 (Mich. 1904). 1 Mechem, *Agency*, § 1046 (1914); 14 Am. Jur. 2d Carriers, § 551; Bates v. Weir (S. Ct. App. Div.) 105 N.Y.S. 785 (1907).

> appearance of authority which the principal himself knowingly permits the agent to assume, or which he holds the agent out to the public as possessing. For the acts of his agent, within his express authority, the principal is liable, because the act of the agent is the act of the principal. For the acts of the agent, within the scope of the authority he holds the agent out as having, or knowingly permits him to assume, the principal is made responsible; because to permit him to dispute the authority of the agent in such cases would be to enable him to commit a fraud upon innocent persons. In whichever way the liability of the principal is established, it must flow from the act of the principal. And when established, it cannot, on the one hand be qualified by the secret instructions of the principal, nor on the other hand be enlarged by the unauthorized representations of the agent."

Lux does not contend that Pollard had expressly requested Vessels Ranch to return Chinchilla to him or have her returned by someone else. Indeed, it appears that Pollard was entirely unaware of Vessels' action. Nor does the evidence require the conclusion that such authority existed because of a past course of dealing between Pollard and Vessels, or some general practice commonly followed by those engaged in the business of breeding horses. Rather, as Lux states in brief:

> "What defendant does contend is that plaintiff, by placing his mare temporarily in the exclusive control of Vessels Ranch, necessarily vested his bailee with apparent authority to return the mare to its owner and, for the purpose of effecting such shipment, to enter into a contract binding upon the owner."

Accurately speaking, "apparent authority" is not authority at all, but is merely a power to affect the principal's

affairs. As already noted, it arises not by authorization in the consensual sense, but from the principal's negligent omission or his acquiescence in the agent's activities. See 1 Mechem, *Agency*, §§ 720-726 (1914). The law gives to the latter the effect of representation to the party dealing with the "agent" that the "principal consents to have the act done on his behalf." Restatement, *Agency* 2d § 27 (1958). To apply the rule of apparent authority, there must therefore be some basis for what may be loosely termed an estoppel against the principal. And this "estoppel" depends upon manifestations by the principal to the third party and not to the agent. Restatement, *Agency* 2d § 49(b)(1958) indicates that "if there is a latent ambiguity in the manifestations of the principal for which he is not at fault, the interpretation of the apparent authority is based on the facts known to the principal."

In this case the sole basis of an "estoppel" against Pollard must rest upon the fact of Vessels' possession. The rule is of long standing, however, that possession of a chattel, standing alone, does not authorize an agent to affect the principal's interest. As the Restatement, *Agency* 2d § 200 (1958) summarizes the law,

> "[a]part from statute, an undisclosed principal who entrusts an agent with the possession of a chattel, other than a commercial document representing a chattel or chose in action, but who does not authorize him to sell it, display it for sale, or otherwise affect the principal's interest in it, is not thereby bound by a transaction with respect to the chattel between the agent and a third person who believes the agent to be the owner."

The reason is plain: mere possession carries no indication of any right to engage in transactions of serious consequence to the owner of the chattel. Possession is as consistent with

tortious acquisition as with full ownership and provides no basis for an assumption that the possessor may deal with the chattel as he pleases.

We think the circumstances of this case preclude a finding that the Vessels Ranch had apparent authority to ship the mare. Here we had an obviously valuable horse to be shipped on a long and arduous journey across one of the hottest areas of the United States. The numerous risks attendant such trip convince us that an owner must do some act of greater significance than to merely relinquish possession before being deemed to have undertaken the risks of this shipment. *Cf. Mitchell v. Union Pac. Railroad Co.*, 242 F.2d 598, 603-604 (9th Cir. 1957).

Our conclusion is fully consonant with the high standards of care imposed on carriers, as illustrated by the case of *Missouri Pac. R.R. Co. v. Elmore & Stahl, supra*, 377 U.S. 134, and is merely an application of the familiar rule that where one of two innocent parties must suffer, the loss falls on him who made it possible. It bears emphasis that the carrier's negligence caused the loss.[9] Realistically, the effect of our conclusion is to deprive the carrier of the slightly higher charge that it would have made had the mare been declared at full value.

The judgment is affirmed.

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9. As an equitable ground for relief, Lux points out the plight of common carriers who must accept shipments from whomever tenders them. But that consideration appears of little weight when measured against an owner's opportunity to protect himself. The carrier need only exercise due care to prevent a loss. The owner, on the other hand, is powerless to do so.

United States Court of Appeals for the Ninth Circuit

No. 19,397

LUX ART VAN SERVICE, INC., a California Corporation,
Appellant,

vs.

ART POLLARD,
Appellee.

JUDGMENT

Appeal from the United States District Court for the District of Arizona.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Arizona, and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the ..... judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered April 20, 1965

Appendix C

SUPREME COURT OF THE UNITED STATES
Oct. Term, 1913

GREAT NORTHERN RAILWAY COMPANY, Plff. in Err.,

v.

GERTRUDE O'CONNOR

Submitted January 6, 1914. Decided February 24, 1914.

In error to the Supreme Court of the State of Minnesota to review a judgment which, on a second appeal, affirmed a judgment of the District Court of Ramsey County, in that state, against a carrier for the full value of a lost interstate shipment, notwithstanding stipulations limiting the carrier's liability to the agreed value. Reversed and remanded for further proceedings.

See same case below on first appeal, 118 Minn. 223, 136 N. W. 743, on second appeal, 126 Minn. 359, 139 N. W. 618.

Statement by Mr. Justice Lamar:

The Boyd Transfer Company of Minneapolis in addition to its regular transfer business acted as a forwarder by railroad. By collecting from different shippers small lots of goods sufficient in the aggregate to fill a car, it secured carload rates, and out of the difference between carload and less than carload rates it made a profit and at the same time was enabled to offer better rates to the small shipper. How this difference between the two rates was divided between owner and forwarder does not appear in the record. At the time of the shipment referred to in this case, the railroad company had four rates on household goods (including emigrant movables), which vary, both according to the weight and value of the shipment, as follows:

Less than carload lots (value not stated).....	$3.00	per cwt.
Less than carload lots (not to exceed $10 per cwt.)	2.00	" "
Carload lots (value not stated).....	1.60	" "
Carload lots (value not to be exceed $10).....	1.00	" "

While these tariffs were in force, the Boyd Transfer Company was employed by the plaintiff, on terms not stated, to box, transfer, and ship certain property which she desired to have sent to Portland, Oregon. The articles consisted of a typewriter, stationery, books, curtains, wearing apparel, jewelry, and other personal effects. Some of them had been packed in a trunk, and the balance were boxed by the Boyd Company and loaded by it into a car filled with household goods. The weight of the load was 22,000 lbs. The Boyd Company filled out a bill of lading, describing the shipment as "One car of Emigrant Movable." "Released to $10 per cwt.," and naming "Boyd Transfer & Storage Company, shipper." The bill of lading on presentation was signed by the agent of the railroad company. The goods were lost *en route* and the plaintiff brought suit against the railroad company for $598.65, their full value. The company filed a plea setting up that the property had been destroyed without its fault, and further contended that in view of the provisions of the tariff, and the fact that the goods had been shipped on the $1 rate, the carrier could not be held liable beyond $10 per hundredweight.

At the trial the plaintiff testified she did not know that there had been any valuation of her goods, as the agent of the Boyd Company in soliciting the shipment had stated that it had a through car, but said nothing to her about shipping her effects as household goods, and she understood that they were to be shipped as a separate consignment. She testified that she had stated to the transfer company that

her goods were new, and as she had no insurance, she was willing to pay the regular rates.

The defendant introduced the tariffs, and offered evidence to show that its agents had no knowledge of the contents of plaintiff's boxes which had been loaded into the car by the transfer company, which also made out the bill of lading and indorsed thereon a statement that the car contained "Emigrant Movables Released at $10 per cwt."

A number of auctioneers and dealers in second hand furniture were introduced as witnesses for the purpose of establishing the average value of secondhand furniture and household goods. They testified that they were familiar with the value of houshold goods and secondhand furniture; testified that only a few of such effects are sold by weight, but the value being ascertained, the articles could be weighed and the value per pound then determined. This they illustrated by giving the cost, weight, and value per pound of various articles, and gave their opinion as to the average value of shipments of household goods, including furniture, carpets, wearing apparel, and the like. One witness stated that the average value was about $4 per cwt., another $5 per cwt., another testified that, including a secondhand piano weighing 1,500 lbs, the average value would be about $7 per cwt. There was no testimony in rebuttal, beyond the fact that the articles belonging to plaintiff were shown to be worth much more than $10 per cwt.

The court charged that if the Boyd Company was the agent of the plaintiff to make the shipment, she was bound by its valuation, provided such valuation was not an arbitrary attempt to limit liability, and left to the jury to determine whether there had been such an arbitrary attempt to limit liability. They returned a verdict for the amount claimed in the complaint. The defendant moved for a new

trial because of errors in the charge and because the verdict was in excess of the sum for which the defendant could be held responsible under the tariffs filed with the Interstate Commerce Commission. The judge held that the carrier was not responsible for $62.50, the value of jewelry and silverware in the trunk, and the plaintiff having written off that amount, judgment was rendered against the defendant for $533.40, a sum much in excess of $10 per cwt. The case was then taken to the supreme court of Minnesota, which affirmed the judgment. It held that the railroad company was charged with knowledge that a considerable portion of the amount received by shipping at reduced rates went to the forwarding company, and not to the various owners of the goods packed in one car; and that the railway company must have known that the Boyd Company was ignorant of the value and contents of the boxes belonging to the different shippers. It ruled that the Boyd Company had no implied authority to make an agreement as to the value of plaintiff's goods. It further held that whether there had been any bona fide attempt to fix value was a question of fact; and as the jury by their verdict had found that there had been no such effort, the plaintiff, under Ostroot v. Northern P. R. 111 Minn. 504, 127 N. W. 177, was entitled to recover the full value of the goods shipped. It further held that the rule announced by it was not opposed to Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A. (N.S.) 257, 33 Sup. Ct. Rep. 148; Chicago, B. & Q. R. Co. v. Miller, 226 U. S. 513, 57 L. ed. 323, 33 Sup. Ct. Rep. 155; Chicago, St. P. M. & O. R. Co. v. Latta, 226 U. S. 519, 57 L. ed. 328, 33 Sup. Ct. Rep. 155. The defendant then sued out a writ of error.

Mr. E. C. Lindley submitted the cause for plaintiff in error. Mr. M. L. Countryman was on the brief.

Under the act to regulate commerce, defendant in error was bound by the released valuation of $10 per cwt. declared by her agent, the Boyd Tranfer & Storage Company, upon which valuation she obtained a lower rate of freight in accordance with the carrier's interstate tariff provisions.

Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148; Kansas City Southern R. Co. v. Carl, 227 U. S. 639, 57 L. ed. 683, 33 Sup. Ct. Rep. 391; Missouri, K. & T. R. Co. v. Harriman, 227 U. S. 657, 57 L. ed. 690, 33 Sup. Ct. Rep. 397; Wells, F. & Co. v. Neiman-Marcus Co., 227 U. S. 469, 57 L. ed. 600, 33 Sup. Ct. Rep. 267; Chicago, B. & Q. R. Co. v. Miller, 226 U. S. 513, 57 L. ed. 323, 33 Sup. Ct. Rep. 155; Chicago, St. P. M. & O. R. Co. v. Latta, 226 U. S. 519, 57 L. ed. 328, 33 Sup. Ct. Rep. 155; Ford v. Chicago, R. I. & P. R. Co. 123 Minn. 87, 143 N. W. 249.

Mr. C. D. O'Brien submitted the cause for defendant in error. Messrs. James Mattimore and T. P. McNamara were on the brief:

Nachtigall, the manager of the Boyd Transfer Company, had no authority to release the value of the goods of defendant in error.

Benson v. Oregon Short Line R. Co. 35 Utah, 241, 136 Am. St. Rep. 1052, 99 Pac. 1072, 19 Ann. Cas. 803.

Without either a contract or acts constituting an estoppel, a carrier may not limit its liability for its own negligence.

Missouri, K. & T. R. Co. v. Harriman, 227 U. S. 657, 57 L. ed. 690, 33 Sup. Ct. Rep. 397; Re Released Rates, 13 Inters. Com. Rep. 554.

Mr. Justice Lamar, after making the foregoing statement of facts, delivered the opinion of the court:

The plaintiff owned personal effects weighing 545 lbs. and worth $598. She employed the Boyd Transfer Com-

pany, which was also a forwarder, to box and ship the property from Minneapolis to Portland. The regular freight rate on such a shipment would have been $3 per cwt.; but without express authority from her, the company forwarded her boxes with others under the terms of a tariff which named $1 as the rate on carload shipments of household goods valued at less than $10 per cwt. The car and its contents were destroyed, and the state supreme court held that the plaintiff was entitled to recover the full value of her property because (1) the railroad agents must have known that the transfer company was a forwarder, without authority to value plaintiff's property, and because (2) there had been no bona fide effort to agree upon a valuation.

1. It is conceded that the carrier had no knowledge of the contents of the boxes which were loaded by the transfer company and forwarded under the low rate applicable to household goods worth less than $10 per cwt. In the absence of something to indicate that the transfer company was guilty of false billing, the carrier was not required to make special inquiry, but could rely on the statement that the car was loaded with goods of the character and value stated. For, although the Boyd Company was a forwarder, engaged in collecting a number of small shipments from various persons in order to fill a car and obtain the lower rates applicable to carload shipments, yet the railroad company was obliged to treat the forwarder as shipper, even though thereby the carrier lost the benefit of the higher rate which would have been applicable to separate and small shipments. This was the ruling in Interstate Commerce Commission v. Delaware, L. & W. R. Co. 220 U. S. 235, 55 L. ed. 448, 31 Sup. Ct. Rep. 392, where it was held that the carriers were not concerned with the question of title, but must treat the forwarder as shipper, and charge

the rates applicable to the quantity of freight tendered regardless of who owned the separate articles. If the forwarder was shipper for the purpose of securing carload rates, it was also shipper for the purpose of classifying and valuing, in order to determine which tariff rate was applicable.

2. The plaintiff contended, however, that she had expected her goods to be transported as a separate consignment. But the transfer company had been intrusted with goods to be shipped by railway, and, nothing to the contrary appearing, the carrier had the right to assume that the transfer company could agree upon the terms of the shipment, some of which were embodied in the tariff. The carrier was not bound by her private instructions or limitation on the authority of the transfer company, whether it be treated as agent or forwarder. If there was any undervaluation, wrongful classification, or violation of her instructions, resulting in damage, the plaintiff has her remedy against that company.

3. The plaintiff, however, claimed that, even if the Boyd Transfer Company is to be treated as her agent to agree upon the terms of shipment, there had been no bona fide effort to agree on a valuation, and that she was therefore entitled to recover the full value of her goods. In order to meet this contention the defendant offered evidence to show that it had no knowledge of the contents of the boxes, and was entitled to rely upon the entry on the bill of lading inasmuch as the fair average value of household goods was less than $10 per cwt. Under the decisions in Kansas City Southern R. Co. v. Carl, 227 U. S. 655, 57 L. ed. 689, 33 Sup. Ct. Rep. 391; Missouri, K. & T. R. Co. v. Harriman, 227 U. S. 657, 57 L. ed. 690, 33 Sup. Ct. Rep. 397, it was not necessary to offer evidence to sustain the reason-

ableness of rates, classification, or other terms in the tariff filed with the Commission. The shipper had the right, by appropriate proceedings, to attack the rate or the classification, and, if either or both were held to be unreasonable, could secure appropriate relief either by reparation order, or by suit in court, after such finding of unreasonableness. But so long as the tariff rate, based on value, remained operative, it was binding upon the shipper and carrier alike, and was to be enforced by the courts in fixing the rights and liabilities of the parties. The tariffs are filed with the Commission and are open to inspection at every station. In view of the multitude of transactions, it is not necessary that there shall be an inquiry as to each article, or a distinct agreement as to the value of each shipment. If no value is stated, the tariff rate applicable to such a state of facts applies. If, on the other hand, there are alternative rates based on value, and the shipper names a value to secure the lower rate, the carrier, in the absence of something to show rebating or false billing, is entitled to collect the rate which applies to goods of that class, and if sued for their loss it is liable only for the loss of what the shipper had declared them to be in class and value.

4. Nor was the result changed because of the use of printed forms. This appears from the ruling in Hart v. Pennsylvania R. Co. 112 U. S. 331, 28 L. ed. 717, 5 Sup. Ct. Rep. 151, where it was claimed that the shipper had not been asked to state the value, but had merely signed a printed contract naming a value. The court said: "The valuation named was the 'agreed valuation,' the one on which the minds of the parties met, however it came to be fixed, and the rate of freight was based on that valuation, and was fixed on condition that such was the valuation, and that the liability should go to that extent and no further." The

rule of the Hart, Carl, and Harriman Cases was not applied in the court below, and the judgment must be reversed, and the case remanded for further proceedings not inconsistent with this opinion.

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In The
Supreme Court of The United States

OCTOBER TERM, 1965

No. 365

LUX ART VAN SERVICE, INC., a California Corporation,
Petitioner,

vs.

ART POLLARD,
Respondent.

Opposing Brief to
Petition for a Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

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Respondent opposes the granting of the Writ of Certiorari prayed for in the Petition seeking a review of the Judgment entered by the United States Court of Appeals for the Ninth Circuit on April 20, 1965, for the reasons set forth herein.

OPINIONS BELOW

Petitioner's designation of the opinion below is not opposed.

JURISDICTION

This Court has jurisdiction of the Petition by virtue of 28 U.S.C. 1254(1).

SUPPLEMENTAL STATEMENT OF THE CASE

Petitioner's statement of the case overlooks certain material portions of the record and the following additions to the synopsis of the evidence will assist the Court in its decision.

In January, 1962, Pollard's mare, Chinchilla, was transported by Pollard's foreman from Pollard's ranch in southeastern Arizona to the Vessels Ranch in southern California to be bred to a champion stallion owned by Vessels (R.234-235). Pollard testified that he had never shipped any of his racing or breeding horses by common carrier and that such stock were always shipped by his own personnel in his own special trailers due to their great value (R.233). Pollard had sent other horses to the Vessels Ranch on previous occasions and had on each occasion transported them there and back by his own personnel using his own equipment (R.237). On these prior occasions Vessels had always called Pollard when the horses were ready to come home (R.237).

The mare's stay at Vessels Ranch would normally have been from a three to six month period (R.236). During this time Pollard had no control over the facilities in which the mare was kept, (R.237) nor did Pollard exercise or have the right to exercise any control over the manner in which the breeding or the care of the mare was to be accomplished (R. 237-238). Pollard was not to oversee the breeding or care of the mare in any way, nor did he in fact do so (R. 238). None of Pollard's employees were to care for the mare nor did Pollard have any employees at Vessels Ranch for this or any other purpose (R. 238). Pollard had absolutely no control over any personnel at Vessels Ranch while the mare was in their possession nor were any of the Vessels employees subject to Pollard's control in any way (R. 238). Pollard never gave to the Vessels Ranch or to the employees or to any other person authority to ship his mare, nor did he ask Vessels or anyone else to send her or bring her back home when the breeding was finished (R. 239). Pollard was merely to pay the

mare's board bills and veterinarian expenses while she was at Vessels Ranch (R.236). Pollard's sole understanding with Vessels' Ranch was that he was to be notified when the mare was ready to return home, and he was never so notified (R. 239).

About midnight on the day the mare died, Petitioner's driver called Pollard at Pollard's home in Arizona to report that his mare was dead (R. 241). Pollard testified that he had never even been aware of the existence of the Petitioner until that phone call (R. 241), and that he had never had any business dealings with Petioner (R. 240). Pollard testified that he had never seen the bill of lading containing the limitation of liability until after the litigation had begun (R. 241-242); that he had never authorized Vessels' Ranch or any of its personnel to sign the same in his behalf (R. 242) or to ship his horse at all (R. 239). He further testified that he had no personal knowledge of how his horse came to be in possession of the Petitioner (R. 243-244) and that neither Vessels' Ranch nor any of its employees had ever been Pollard's employees or agents for any purpose (R. 244). Moreover, Petitioner's president, one Ernest Baum, testified there was no evidence that Pollard was aware of any custom or practice that might have grown up between the Petitioner and Vessels' Ranch in regard to the shipment of horses (R. 237).

REASONS FOR NOT GRANTING THE WRIT

I

THE JUDGMENT OF THE COURT OF APPEALS SHOULD NOT BE REVIEWED BECAUSE IT IS NOT, AS PETITIONER CONTENDS, IN CONFLICT WITH THE DECISION OF THE SUPREME COURT IN GREAT NORTHERN RAILWAY CO. v. O'CONNOR, 232 U.S. 508, 34 S. Ct. 380, 58 L. Ed. 703.

The O'Connor case is clearly distinguishable from the instant case upon its facts:

In the O'Connor case, Gertrude O'Connor specifically employed an agent for the express purpose of packing, delivering to a carrier for shipment, and shipping certain personal property. The agent was in fact a transfer company engaged in that sole endeavor. As Mr. Justice Lamar stated in the O'Connor case,

> ". . .The Boyd Transfer Co. was employed by the Plaintiff on terms not stated, to box, transfer and ship certain property which she desired to have sent to Portland, Oregon. . ." (Petition, Page 17)

Again, Justice Lamar stated:

> ". . .She employed the Boyd Transfer Co., which was also a forwarder, to box and ship the property from Minneapolis to Portland. . ." (Petition, pages 20-21)

As an incident to the shipping of the goods, Mrs. O'Connor's agent executed a shipping document containing a limitation of the carrier's liability. It apparently did so in violation of certain private instructions given the agent by Mrs. O'Connor. The goods were lost in transit and Mrs. O'Connor brought suit against the carrier for their value. The carrier set up as a defense the limitation of liability in the shipping document executed by Mrs. O'Connor's agent. The Supreme Court held that when Mrs. O'Connor gave to her agent express authority to ship, she thereby conferred upon her agent incidental authority to enter into a contract with the carrier concerning the carrier's liability, as an incident to the shipping transaction.

As the Court stated:

> ". . .The transfer company had been entrusted with goods to be shipped by railway, and nothing to the contrary appearing, the carrier had the right to assume that the transfer company could agree upon the terms of shipment. . ." (Emphasis supplied) (Petition, Page 22)

In the Pollard case, however, both the District Court and the Court of Appeals held that there was no express authority to ship given by Pollard to Vessels' Ranch.

Indeed, Petitioner in its brief at page five, concedes that Vessels' Ranch was not an agent of Pollard for the purposes of shipping the horse, but was a mere "bailee". The record clearly indicates that the bailee's authority was limited to breeding the horse and providing the necessary care during the breeding period: no authority was given by Pollard to the bailee to ship the horse, and in fact the bailee was specifically instructed to hold the horse until Pollard came to get it. The purposes for which the bailment was created and the limitations upon the powers of the bailee are set out in Respondent's Supplemental Statement of the Case with appropriate citations to the record.

Upon this record both the District Court and the Court of Appeals expressly held that Vessels' Ranch, the bailee, was not Pollard's actual or ostensible agent for the purpose of shipping the horse or for executing the bill of lading containing the limitation of liability. The shipping transaction between Vessels' Ranch

and the Petitioner was between those two parties alone. The Court of Appeals, in affirming the decision of the District Court, found that Pollard did not authorize the shipment of the horse, did not authorize the execution of the bill of lading containing the limitation of liability, and that as to these transactions, Pollard did not participate in them or approve them, and that he was not even aware of them.

It cannot be contended that the Court of Appeals was unmindful of the rule of law enunciated in the O'Connor case, for the Court of Appeals in its decision stated the O'Connor rule succinctly as follows:

> ". . .Authority to ship confers upon the agent incidental authority to enter into a contract with the carrier concerning liability." (Citing cases) (Petition, Page 11)

But, as the facts in the Pollard case established that there was no actual or apparent agency, or agency by estoppel, as contended by Petitioner, the Court of Appeals properly refused to apply the O'Connor rule to this altogether different state of facts, and instead applied the proper rule of law, which it summarized in the following quotation from the Restatement of Agency: (Petition, Page 13)

> "(a) Apart from statute, an undisclosed principal who entrusts an agent with the possession of a chattel, other than a commercial document representing a chattel or chose in action, but who does not authorize him to sell it, display it for sale, or otherwise affect the principal's interest in it, is not thereby bound by a transaction with respect to the chattel between the agent and a third person who believes the agent to be the owner."

Restatement of Agency (2d) Sec. 200 (1958)

Of course the Restatement rule is merely a "restatement" of the appropriate federal and state law on the subject.

Mere possession of personal property, standing alone, is not such indicia of ownership as will justify a third party in believing that the possessor is authorized to enter into transactions affecting the property:

John Clay and Co. Livestock Commission v. Clements, (C.A. Texas) 214 F. 2d 803

DeVries v. Sig Ellingson and Co., 100 F. Supp. 781, Affirmed 199 F.2d 677, Cert. denied, 73 S. Ct. 505, 344 U.S. 934, 97 L. Ed. 719

Irick v. Elkins, 38 N. M. 113, 28 P.2d 659

Bustin v. Craven, 57 N. M. 724, 263 P.2d 392

Adkisson v. Waitman, 202 Okla. 309, 213 P.2d 465

II

THE COURT OF APPEALS DID NOT DEPART FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS; THE COURT OF APPEALS APPLIED A RULE OF LAW WHICH WAS IN HARMONY WITH ITS OWN PRIOR DECISIONS, AND WITH DECISIONS OF OTHER COURTS OF APPEAL, IN THE SAME MATTER.

The rule is well settled among the Courts of Appeal that whether one acts independently, or as an agent with actual or ostensible authority, is a question for the trier of fact when the issues are disputed:

Seaboard Properties v. Bunchman, (C.A. Florida) 278 F.2d 679

Mitchell v. Southern Pacific Railway Co., (C. C. A. Cal.) 242 F.2d 598

J.J. Quinlan and Co. v. Holbrook, (C.C.A. Vermont) 162 F.272

Pacific Can Co. v. Hewes, (C.C.A. Wash.) 95 F.2d 42

Mitton v. Granite State Fire Insurance Co., (C. A. Colo.) 196 F.2d 679

Similarly, the existence of an estoppel is a question of fact and is to be determined by the trier of fact:

Albert v. Joralemon, (C.C.A. Ariz.)
271 F.2d 236

Quon v. Niagara Fire Insurance Company of N.Y. (C.C.A.Cal.)
190 F.2d 257

Peoples' Loan and Finance Co. v. Halbiesen Motor Company, (C.C.A. Georgia)
271 F.2d 538

N. Litterio and Co. v. Glassman Construction Co., (C.A.D.C.)
319 F.2d 736

Higgins v. Arizona Savings and Loan Association,
90 Ariz. 55, 365 P.2d 476

Cardosa v. Fireman's Fund Ins. Co.,
144 Cal. App. 2d 279, 300 P.2d 875

Hudson v. Morgan and Peacock Properties Co.,
170 Cal. App. 2d 328, 339 P.2d 180

31 C.J.S. Estoppel Sec. 163

The fact that the Court of Appeals in its decision emphasized that the carrier's negligence caused the loss is merely an application of a rule pronounced by this Court in Town of Orleans v. Platt, 99 U.S. 676, 25 L. Ed. 404, wherein the Court held that where one of two innocent persons must suffer loss, the loss falls upon the party who contributed to produce it.

It is interesting to note that the Supreme Court of North Dakota in considering a fact situation identical with the case at bar reached exactly the same conclusion as did the Court of Appeals in this case.

Schlosser v. Great Northern Railway Co.,
20 N.D. 406, 127 N.W. 502

III

THE QUESTION HERE INVOLVED IS NOT A FEDERAL QUESTION OF SUBSTANCE OR IMPORTANCE. THE SOLE QUESTION INVOLVED IS THE SUFFICIENCY OF THE EVIDENCE TO ESTABLISH AN ESTOPPEL AS AGAINST THE RESPONDENT.

Where a Court of Appeals affirms the findings of fact of the District Court on a disputed fact issue, the Supreme Court will not ordinarily review the sufficiency of the evidence to sustain the findings of fact.

Boehmer v. Pennsylvania Railroad Co.,
40 S. Ct. 409, 252 U.S. 496, 64 L. Ed. 680

The Poznan,
47 S. Ct. 482, 274 U.S. 117, 71 L.Ed. 455.

See also:

Hallendeck v. Leimert,
55 S.Ct. 687, 295 U.S. 116, 79 L.Ed. 1339

Indeed, this Court has previously refused to grant certiorari to review the sufficiency of evidence to establish an estoppel:

Hampton v. Paramount Pictures Corp., (C.C.A. Cal.)
279 F. 2d 100, 84 A.L.R. 2d 454, Cert. denied,
81 S. Ct. 170, 364 U.S. 882, 5 L.Ed 2d 103

IV

THE DECISION OF THE COURT OF APPEALS DOES NOT DEPRIVE PETITIONER OF ITS REMEDY AGAINST THE BAILEE.

Petitioner's allegation that under the decision of the Court of Appeals ". . .the Vessels' Ranch is insulated from liability. . . to the Petitioner," and that ". . .Petitioner cannot recover from the bailee for such misrepresentation. . ." is a non-sequitur. Vessels Ranch is not a party to this litigation and consequently none of the issues herein are res judicata as between Petitioner and Vessels Ranch, and Petitioner is free to pursue its remedy, if any it has, against Vessels Ranch for any misrepresentations as to its authority.

Arnstein v. Porter, (C.C.A. N.Y.)
154 F.2d 464

Pulitzer Publishing Co. v. Current News Features, (C.C.A. Mo.),
94 F.2d 682, Cert. denied, 58 S.Ct. 1040, 304 U.S. 570, 82 L.Ed. 1535.

Lewis v. Ingram, (C.C.A. Okla.),
57 F.2d 463, Cert. denied, 53 S.Ct. 16, 287 U.S. 614, 77 L. Ed. 533.

CONCLUSION

For the reasons set forth above, the Writ should be denied.

Respectfully submitted,

Raymond F. Hayes

Counsel For Respondent

PROOF OF SERVICE

STATE OF ARIZONA)
) ss.
COUNTY OF PIMA)

I, RAYMOND F. HAYES, the attorney of record in this Court for ART POLLARD, the Respondent herein, depose and say that on the 23rd day of July, 1965, I served a copy of the foregoing Opposing Brief to Petition For a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit by delivering the same to a clerk in the offices of SIDNEY WEISSBERGER, located at 603 Arizona Land Title Building, Tucson, Arizona, and to a clerk in the offices of JAMES L. RICHMOND, located at 304 Southern Arizona Bank Building, Tucson, Arizona, both counsel of record for LUX ART VAN SERVICE, INC., a California corporation, Petitioner herein.

Raymond F. Hayes

Subscribed and sworn to before me at Tucson, Arizona, this 23rd day of July, 1965.

Eva Ramirez
Notary Public

My Commission Expires:
October 20, 1968